

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)
Hal Edwin Buettner, III, and)
Michele Kay Elkins,) Case No. 16-26531-C-13G
Debtors.)
) Adv. Pro. No. 22-02015-C
Hal Edwin Buettner, III, and)
Michele Kay Elkins,) Consolidated
Plaintiffs,)
v.) DCN PGM-3
)
PHH Mortgage Corporation,)
Defendants.)

In re:)
Kevin Randall Krone,)
Debtor.)
) Case No. 15-21528-C-13G
Kevin Randall Krone,)
Plaintiff,) Adv. Pro. No. 22-02038-C
v.)
) Consolidated
PHH Mortgage Corporation, and)
Deutsche Bank National Trust) DCN PGM-3
Company,)
Defendants.)

ORDER AWARDING FEES

CHRISTOPHER M. KLEIN, Bankruptcy Judge:

Plaintiffs' counsel in these consolidated adversary proceedings actions seeks an award of prevailing party attorney's fees under California Civil Code § 1717 in litigation involving California notes and deeds of trust that include fee provisions.

In a published Opinion, this court ruled that plaintiffs are entitled to fee awards as prevailing parties. Buettner v. PHH Mortgage Corp. (In re Buettner), 654 B.R. 927 (Bankr. E.D. Cal. 2023). The issue was whether Bankruptcy Courts have power to order liens removed and to clear title after completion of chapter 13 plan payments that render "void" and "strip off" wholly unsecured mortgage liens pursuant to § 506(d). Id.

1 The respective promissory notes and deeds of trust in the
2 consolidated cases provide for attorney's fees. California Civil
3 Code § 1717 makes all fee provisions reciprocal in favor of the
4 prevailing party. Hence, the present fee application.

5 The federal lien removal cause of action that is embodied in
6 Federal Rule of Bankruptcy Procedure 7070, as explained in the
7 published decision, is a species of in rem judgment enforcement
8 in which the judgment being enforced is the final § 1322(b) order
9 confirming the chapter 13 plan, which order has res judicata
10 effect and renders a lien "void" under § 506(d) upon completion
11 of plan payments.

12 Federal lien removal actions by chapter 13 debtors have been
13 approved and have been held to qualify for prevailing party
14 attorneys' fees where notes and deeds of trust provide for fees.
15 HSBC Bank USA, Nat'l Ass'n. v. Blendheim (In re Blendheim), 803
16 F.3d 477, 501-02 (9th Cir. 2015); Luchini v. JPMorgan Chase Bank,
17 N.A. (In re Luchini), 511 B.R. 664, 678-81 (Bankr. E.D. Cal.
18 2014); Martin v. CitiFinancial Services, Inc. (In re Martin), 491
19 B.R. 122, 129-30 (Bankr. E.D. Cal. 2013) (Sargis, B.J.); cf. In re
20 Frazier, 469 B.R. 889 (E.D. Cal. 2012) (England, D.J.), aff'g 448
21 B.R. 803 (E.D. Cal. 2011) (anticipating Blendheim).

22 There was a separate count in the Complaints focused on
23 California Civil Code § 2941, which also requires reconveyance as
24 a matter of state law and provides for a \$500 award (plus actual
25 damages), on which count the Plaintiffs also demanded fees. After
26 the Complaints were filed, PHH attempted to moot the action by
27 reconveying and making an Offer of Judgment but refusing to
28 include attorney's fees in the Offer. PHH asserted, incorrectly,

1 that fee awards are not available in cases premised on § 2941. By
2 continuing to contest the fee issue asserted in the complaint,
3 PHH failed to moot the action and left the door open to decide
4 the count asserting the federal lien removal cause of action with
5 attorney's fees attendant to that cause of action.

6 7 Fee Application Rules

8 Fees are generally based on the "lodestar" formula - the
9 number of hours reasonably expended multiplied by the applicable
10 hourly market rate for legal services.

11 The pertinent law has long been settled in leading Supreme
12 Court cases and numerous decisions of the courts of appeals.
13 E.g., Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson,
14 465 U.S. 886 (1984); Alan Hirsch, Diane Sheehey & Tom Willging,
15 AWARDING ATTORNEYS' FEES AND MANAGING FEE LITIGATION, 23-60 (Federal
16 Judicial Center, 3d Ed. 2015) ("FJC FEE LITIGATION").

17 The fee applicant has the burden of establishing lodestar
18 rate and hours reasonably expended. Hensley, 461 U.S. at 433.

19 20 Lodestar Rate

21 In determining the applicable hourly market rate, the
22 attorney's customary billing rate provides the starting point.
23 E.g., Missouri v. Jenkins, 491 U.S. 274, 285 (1989).

24 The specific rate takes into account the skill and
25 experience of the attorney in the forum community. Blum, 465 U.S.
26 at 895-96 n.11.

27 Here, the evidence presented by the applicant is that the
28 \$350/hour rate evidenced by the contract with the clients in

1 these consolidated cases is his customary billing rate.

2 The \$350/hour rate is consistent with the experience and
3 skill of counsel, who is an experienced consumer debtor
4 practitioner in the Sacramento Division of the Eastern District
5 of California specializing in chapter 7 and chapter 13 cases,
6 along with the occasional related adversary proceeding. He has
7 been in practice for about 20 years and has participated in about
8 8000 bankruptcy cases.

9 However, his actual experience in litigating more
10 complicated adversary proceedings is more limited. His skill set
11 is focused on the finite set of issues involved in achieving
12 satisfactory resolutions for individual consumers who find
13 themselves insolvent. He does not pretend to have the skills of a
14 more accomplished federal litigator for whom, in this legal
15 marketplace, the lodestar rate is higher than \$350/hour.

16 This adversary proceeding involved an important but obscure
17 federal cause of action that ordinarily would be tackled by a
18 more skilled practitioner deserving of a higher lodestar rate.
19 The applicant deserves credit for having had the insight to
20 recognize that something was fundamentally wrong about the
21 behavior of defendant PHH and to serve up the rudiments of what
22 turned out to be the prevailing theory - he smelled the rat and
23 called it out. In doing so, he persevered against a tenacious
24 opposition interposed by a major national law firm that spared
25 little expense in the course of the defense.

26 In short, this court is persuaded the appropriate lodestar
27 for this attorney in this case is \$350/hour.

1 Hours Reasonably Expended

2 In determining hours reasonably expended, the fee applicant
3 must provide appropriate documentation, exercise "billing
4 judgment," and exclude hours not "reasonably expended." Hensley,
5 461 U.S. at 434.

6 Those questions necessarily implicate the context of the
7 litigation and of the defense.

8 The issue is whether at the time the work was performed a
9 reasonable attorney would have engaged in similar time
10 expenditures. Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980).

11 The Supreme Court has explained, "the defendant cannot
12 litigate tenaciously and then be heard to complain about the time
13 necessarily spent by the plaintiff in response." City of
14 Riverside v. Rivera, 477 U.S. 561, 580 n.11 (1986).

15 Experienced federal judges recommend "making it a practice
16 to compare plaintiff billing records with defendant billing
17 records as one measure of the reasonableness of a fee request."
18 FJC FEE LITIGATION, 31. Defendant PHH has conceded that its fees in
19 the defense of these adversary proceedings were about \$28,000.

20 In the absence of bad faith or failure to cull hours on
21 unsuccessful claims, a properly supported fee application
22 ordinarily will be treated as meritorious. See Mendez v. County
23 of San Bernardino, 540 F.3d 1109, 1127-28 (9th Cir. 2008).

24
25 These Fee Applications

26 Counsel seeks in these two adversary proceedings a total of
27 \$59,475 for 117 billable hours at \$350/hour, plus 10.5 paralegal
28 hours at \$75/hour.

1 As noted, the documentation provided in these consolidated
2 fee applications is less detailed than what usually is maintained
3 by a law firm whose business model is billing by the hour, with
4 counsel routinely preparing daily time records. The documentation
5 provided here is that of the sole practitioner whose business
6 model does not emphasize hourly billing, but rather tends to rely
7 on a comparatively modest flat fee basis.

8 Hence, the time records do not appear to be fully
9 contemporaneous in a manner typical of sophisticated law firms.
10 They bear some evidence of having been reconstructed by counsel
11 who does not routinely bill consumer clients by the hour and
12 include some approximations.

13 Since contemporaneous time records are, strictly speaking,
14 not essential for a fee award, reconstructed records that include
15 reasonable approximations may suffice. Reconstructions and
16 approximations are not fatal, rather they are matters that bear
17 on the weight afforded by the court as it exercises discretion
18 and may warrant an appropriate adjustment on that account.

19
20 Defendant PHH's Opposition

21 Defendant PHH, which admits that its counsel billed about
22 \$28,000 for its defense, objects that the fee request is
23 excessive and inadequately documented.

24 PHH objects that: (1) time entries are inflated, confusing,
25 and blocked together; (2) time claimed is disproportionate to
26 actual work product; (3) Plaintiffs fail to account for not
27 responding to Offers of Judgment; and (4) \$59,475 is out of
28 proportion to the actual recovery.

1 PHH urges that the total fee awards to Plaintiffs should not
2 exceed \$12,062.50, notwithstanding that it interposed a \$28,000
3 defense.

4 PHH does not assert that Plaintiffs are not prevailing
5 parties. Indeed, it is beyond cavil that reconveyances of the
6 secondary deeds of trust were not executed and recorded until
7 after the adversary proceedings were filed. Moreover, PHH had
8 stonewalled the plaintiffs and not responded to prior
9 communications from plaintiffs' counsel.

10 The causation question might be more difficult if PHH had
11 responded with apologies for the oversight and promises to
12 accomplish the reconveyances. In sum, this court is persuaded
13 that the filing of the adversary proceedings was the
14 precipitating cause of the execution and recording of the
15 reconveyances.

16 17 Analysis of Objections

18 The objections will be addressed seriatim.

19
20 1

21 The objection by PHH that the time entries are confusing,
22 inflated, and blocked together has some merit.

23 The time aspect of the documentation is less precise than
24 what one ordinarily sees in hourly billing in which various tasks
25 are separately accounted for, usually in tenths of hours.

26 The task documentation is likewise less precise than what
27 one ordinarily sees in hourly billing.

28 Nevertheless, there is no specific requirement that all fee

1 applications must follow the usual format.

2 There are, in essence, two critical questions before the
3 court: (1) Was counsel acting in good faith in rendering the
4 services?; and (2) Did the tasks for which fees are requested
5 appear to be reasonably necessary at the time the services were
6 rendered (as opposed to 20/20 hindsight)?

7 One must also be mindful that consumer debtors' counsel must
8 deal with the human dimension of the problem of the individual
9 consumer trying to clear debt on the consumer's home. The reality
10 of life for such practitioners is that they are forced to spend
11 time functioning as quasi-psychologists holding their clients'
12 hands as they try to enforce the clients' rights against a
13 faceless institutional creditor represented by sophisticated
14 counsel.

15 The correlative reality for PHH when dealing with individual
16 consumer debtors on matters so personal as the consumers' homes
17 is that, as in tort, it takes its victims as it finds them and
18 can reasonably be charged with being mindful of the psychological
19 consequences that are inflicted by their passive aggression.

20 This court is persuaded that the applicant was acting in
21 good faith in rendering services in the causes of his clients. As
22 will be explained, part of the challenge facing the applicant was
23 coping with countering a vigorous and partially-unmeritorious
24 defense interposed by PHH.

25 Likewise, this court is persuaded that the tasks for which
26 fees are requested were reasonably necessary at the time they
27 were rendered.

28 The presence of the need to cope with a vigorous and

1 partially-unmeritorious defense informs the analysis of whether
2 services appeared to be reasonably necessary at the time they
3 were rendered.

4 Taking into account the vigorous defense advanced by PHH,
5 some of which (as will be seen) was lacking in merit and
6 seemingly made in bad faith, this court is persuaded that the
7 applicant plaintiffs' counsel was acting in good faith and
8 reasonably required additional time to cope with the vigorous
9 defense interposed by PHH. Although another lawyer with a higher
10 lodestar rate might have been able to achieve a similar result in
11 less time, the lower lodestar will tend to be associated with
12 taking longer to do so.

13 This court is persuaded that the deficient documentation
14 warrants the exercise of discretion to make a downward adjustment
15 in the fee request of twenty percent.

16
17 2

18 Analysis of the objection that the time claimed is
19 disproportionate to the work product and necessitates assessment
20 of the nature of the defense that the plaintiffs were required to
21 overcome. That defense was substantial and not entirely made in
22 good faith.

23
24 a

25 The context of the litigation influences the good faith
26 analysis and illustrates what plaintiffs' counsel was up against
27 in litigating with PHH.

1 (1)

2 Good faith is a reciprocal concept. A defendant who makes an
3 argument lacking in merit and in dubious good faith as part of
4 the defense is in no position to question the good faith of the
5 plaintiff in dealing with that situation.

6 Here, PHH argued that, because one of the debtor plaintiffs
7 had been in default before filing the chapter 13 case, PHH was
8 under no obligation to reconvey until the original debt was paid
9 in full: (1) notwithstanding the final and binding federal court
10 decision that the debtor was unsecured; (2) notwithstanding that
11 the chapter 13 plan payments were complete; and (3)
12 notwithstanding that the lien was void as a matter of federal
13 law.

14 The PHH argument that it is entitled to decline to reconvey
15 until after full payment of the original debt lacks merit and
16 reflects a surprising disregard of the Supremacy Clause of the
17 U.S. Constitution. As suggested in this court's published
18 opinion, it is indicative of the brick wall that PHH had erected,
19 the good faith of which is dubious. Buettner, 654 B.R. at 940
20 n.11.

21 While PHH contends that the fees requested are
22 disproportionate to the result achieved, PHH ignores that a
23 substantial portion of the services rendered were on account of
24 the vigor of the PHH defense. Countering the vigorous defense
25 necessarily required additional professional services.

26 In short, the claimed fees in that context are not out of
27 proportion to the result achieved.

1 (2)

2 Another problem probative of lack of good faith by PHH is
3 illegitimate citation of precedent.

4 PHH cited the decision in Luchini, 511 B.R. at 678-81, as
5 authority for the proposition that attorney's fees are not
6 available under the California Civil Code § 2941 statutory remedy
7 for delayed reconveyances of deeds of trust. In doing so, it
8 cited a snippet from Luchini in which the Luchini court noted
9 that the California legislature did not prescribe a specific
10 attorney's fees remedy for a § 2941 violation.

11 The problem for PHH is that the holding in Luchini is that
12 attorney's fees are available for violations of § 2941 by virtue
13 of California Civil Code § 1717 where the underlying note or deed
14 of trust provides for attorney's fees.

15 PHH's snippet from Luchini illegitimately transmogrifies the
16 analysis of that case, which stands for the proposition that the
17 California legislature did not need to create a specific fee
18 provision in § 2941 because § 1717 is up to the task.

19 The experience of this court is that virtually every note
20 and deed of trust in the modern era contains some form of an
21 attorney's fee clause that potentially triggers § 1717. This case
22 is no exception.

23 Diametrically misstating the holdings of cases is a problem
24 for PHH and PHH's counsel. It is of ethical proportions that this
25 court does not take lightly. The fee applicant here has had to
26 cope with that problem.

b

Nor is the result achieved as insignificant as PHH urges. PHH tried to confine the issue to California law but, by resisting attorney's fees, left the door open to decision on the federal count. Like the proverbial ostrich, PHH has its head in the sand.

The published decision regarding the federal count articulates the poorly-understood contours of the operation and effect of the federal lien removal power embodied in Federal Rule of Bankruptcy Procedure 7070. The analysis applies nationwide to every state in which reconveyances and mortgage releases are required.

The simple fact of the matter is that in a chapter 13 case the Bankruptcy Court's valuation of a junior lien at zero is an appealable order that has res judicata effect, with the consequence that the attendant lien is void as a matter of federal law effective upon completion of payments under a confirmed chapter 13 plan. Bullard v. Blue Hills Bank, 575 U.S. 496, 502 (2015); Espinosa v. United Student Aid Funds, Inc., 559 U.S. 260, 270 (2010); HSBC Bank USA, Nat'l Assoc. v. Blendheim (In re Blendheim), 803 F.3d 477, 489 (9th Cir. 2015); Enewally v. Wash. Mut. Bank. (In re Enewally), 368 F.3d 1165 1172-73 (9th Cir. 2004).

Upon completion of payments, the judgment is encompassed by Federal Rule of Bankruptcy Procedure 7070, incorporating Federal Rule of Civil Procedure 70, that may be enforced by judicial lien removal. The power is enforceable, inter alia, by contempt. Fed. R. Civ. P. 70(e), incorporated by Fed. R. Bankr. P. 7070.

The decision on the federal lien removal counts amounted to a declaration the Plaintiffs were entitled to an order vesting title promptly upon completion of their chapter 13 plan payments and, borrowing the California reciprocal fee statute, were entitled to attorney's fees. It was an application of Federal Rule of Civil Procedure 70, as incorporated and expanded by Federal Rule of Bankruptcy Procedure 7070 decided adversely to PHH over PHH's opposition that there is no such cause of action.

It is a happy coincidence for the debtor plaintiffs that applicable nonbankruptcy law also provides for attorney's fees on account of the federal cause of action.

3

The objection that fees should be disallowed for not having responded to the Offer of Judgment by PHH is not persuasive.

PHH says it made an Offer of Judgment under Civil Rule 68, as incorporated by Bankruptcy Rule 7068, and complains that the plaintiffs did not respond.

Although perhaps impolite to decline to respond to an Offer of Judgment, Rule 68 does not require a response.

If not timely accepted, it is considered withdrawn and is described as an "unaccepted offer." Fed. R. Civ. P. 68(b), incorporated by Fed. R. Bankr. P. 7068.

An "unaccepted offer" is not admissible except in a proceeding to determine costs. *Id.*

By excluding attorney's fees from the Offer of Judgment, which fees were an integral part of the Complaint, the PHH Offer of Judgment was not for the complete relief requested and is

1 admissible only if this fee application qualifies as a
2 "proceeding to determine costs."

3 From the standpoint of mootness, the consequence of an
4 unaccepted Offer of Judgment is that "with the offer off the
5 table, and the defendant's continuing denial of liability,
6 adversity between the parties exists." Campbell-Ewald Co. v.
7 Gomez, 577 U.S. 153, 156 (2016).

8 The key consequence of an unaccepted offer is that if the
9 judgment the offeree finally obtains is not more favorable than
10 the unaccepted offer, then the offeree must pay the costs
11 incurred after the offer was made. Fed. R. Civ. P. 68(d).

12 The problem for PHH is that the ultimate result here is more
13 favorable, not less favorable, than its Offer of Judgment for two
14 reasons.

15 First, the judgment includes a determination of entitlement
16 to the attorney's fees that PHH asserted were not available.

17 Second, the result of the declaration of the rights of the
18 parties pursuant to the federal lien removal action applies to
19 PHH nationwide, not merely in California.

20
21 4

22 The objection that the requested fees are out of proportion
23 to the actual recovery is similarly not persuasive.

24 The fact of the matter is that PHH and its counsel should
25 not have stonewalled the debtors and their counsel when they
26 requested the reconveyances to which they were unquestionably
27 entitled. Rather, PHH should have apologetically admitted to the
28 delay and promised prompt corrective action. Instead, PHH chose


1 to play litigation hardball and cannot now be heard to complain
2 that it must pay plaintiff debtors' counsel for his troubles.

3
4 Conclusion

5 Counsel seeks in these two adversary proceedings a total of
6 \$59,475 for 117 billable hours at \$350/hour, plus 10.5 paralegal
7 hours at \$75/hour. For the reasons explained, a downward
8 adjustment of twenty percent is an appropriate exercise of
9 judicial discretion on account of imprecise documentation of time
10 and services. Otherwise, the requested fees are appropriate under
11 lodestar standards. Accordingly, fees in the amount of \$47,580
12 are awarded to the fee applicant.

13 SO ORDERED

14 **Dated: March 08, 2024**

15
16
17 
18 _____
19 United States Bankruptcy Judge
20
21
22
23
24
25
26
27
28

**INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST**

The Clerk of Court is instructed to send the Opinion entered in Case No. 22-02038, Krone v. Deutsche Bank National Trust Company et al; and in Case No. 22-02015, Buettner, III et al v. Residential Funding Corporation et al, via BNC, to the following parties:

Peter G. Macaluso
7230 South Land Park Drive #127
Sacramento, CA 95831

Hal Edwin Buettner III
4525 Anatolia Drive
Rancho Cordova, CA 95742

Michele Kay Elkins
4525 Anatolia Drive
Rancho Cordova, CA 95742

Kevin Randall Krone
1154 Wallace Way
Yuba City, CA 95993

Benjamin White
Troutman Pepper Hamilton Sanders LLP
11682 El Camino Real
Suite 400
San Diego, CA 92130